IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 904 OF 2006

1. Shri Kamal Kumar Goyal
and Ors. ....Applicants.

V/s

The State of Maharashtra ....Respondents.

Mr. Mahesh Jethmalani with Mr. A.H.H. Ponda for the applicants.

Ms. S.D. Shinde A.P.P. for the State

Mr. Raje B. Thakare for the complainant.

CORAM: V.M. KANADE, J.

DATE: 27th March, 2006

P.C.:

1. Heard the learned Counsel for the applicants and the learned Counsel for the respondent.

2. The applicants have an apprehension that they are likely to be arrested in connection with C.R. No. 19 of 1999 registered with EOW, GBCB, CID, Mumbai for the offence punishable under sections 420, 406, 467, 468, 471 read with section 120-B of the Indian Penal Code.

3. The applicants are carrying on business as transporters under the name and style "East West

Carriers" and "Manav Freight Carriers". They have all India permit to transport the goods by truck from one destination to other. One of their customers is Godrej-Ge Appliances Ltd and Godrej-Ge Enterprises and they have been transporting the goods for the said firms since last number of years.

4. It is the case of the applicants that the applicants submit their bills to the Godrej-Ge Appliances Ltd after their goods are transported and delivered to the party to whom the delivery has to be made and after obtaining acknowledgement and stamp from the party to whom the goods are delivered, the company then verifies the bill, checks its contents with the actual receipt of goods and certifies the same as being fit for payment. The Accounts Department, after verification done by the staff of Godrej-Ge Appliances and further verification by their Audit Department, makes payment to the applicants concerned after deducting TDS. It is the case of the applicants that in respect of both these firms, they owe the amount of Rs.1,52,74,477.80 less Rs 39,00,000/- which is the advance payment received by the applicants and the TDS Certificate for Rs 88 lakhs has been issued to the applicants by Godrej-Ge Appliances Ltd. without making any payments to the

applicants.

5. It is submitted that though number of letters were written by the applicants to the said two firms to pay their outstandings, yet the payment has not been made. This was done way back in April 1998. The applicants, therefore, have retained 10 trucks by way of lien and this fact was informed to the Company. While negotiations were going on, some time in June 1999, they were informed that they were wanted in connection with the offence punishable under sections 420, 409, 120-B of the Indian Penal Code in respect of the complaint lodged by Godrej-Ge Appliances Ltd. They, therefore, filed an application in the Court of Sessions seeking anticipatory bail vide Application No. 940 of 1999. The said application was disposed of with a direction that the applicants should be given 72 hours notice prior to their arrest.

6. The investigation was closed by the Investigating Officer on two occasions after the applicants were called to the Police Station on number of occasions and the police closed the file stating that the dispute, essentially, was a civil dispute. Both the parties filed civil suits in this Court for recovery of dues. Thereafter, in 2003, notice was received by

the applicants and they therefore filed an application for anticipatory bail. Initially, ad-interim relief was granted by the Sessions Court. However, subsequently the application was rejected and, therefore, this application has been filed in this Court.

7. It is the case of the applicants that the charge-sheet has been filed in the present case and in respect of that the applicants are sought to be arrested though the matter pertains to 1/4/1997 to 4/11/1998. The learned Counsel appearing on behalf of the applicants submitted that though similar complaints are filed in respect of six other transporters, no action is being taken against them. The learned Counsel also invited my attention to the application filed by two other co-accused viz. Tushar Dave and Pervez Dhatigara who were working with the Godrej-Ge Company and anticipatory bail was granted to both these employees. It is submitted that these applications were not opposed by the Company. He has also invited my attention to the application filed by the Police for closing the investigation of the earlier complaint in respect of the same set of facts, which was filed in the Court of the Additional Chief Metropolitan Magistrate, 34th Court, Mumbai. In the

said report, the Investigating Officer, after giving brief facts of the complaint and pointing out the inquiries which were made by the police, has observed that the case, essentially, was of a civil nature and, therefore, closed the case. The learned Counsel submitted that this report was filed on 6/3/2000 by the Senior Inspector of Police, General Branch, C.B.C.I.D. and, again, after six years, a fresh investigation was sought to be made by the Police.

8. The learned Counsel appearing on behalf of the complainant, on the other hand, submitted that the custodial interrogation of the applicant was essential since the complaint was in respect of the offence of forgery/cheating to the tune of Rs 5,96,65,789/-. It is submitted that the goods/consignments notes were manipulated and duplicate documents were inserted for the purpose of cheating the Company. It is alleged that the signature and stamps of the Company's employees in the Stores Department were forged. It is submitted that, during the course of investigation, when the registration numbers of the vehicles which were used for transporting the goods as per the G.C. Notes were verified, it was found that two wheelers, three wheelers, motor tankers and even the government vehicles were used. It is further submitted that a

part of the money which was received fraudulently was utilised for purchase of an immovable property by the applicants.

9. The Investigating Officer has stated in his affidavit in reply that in respect of the other transporters the main Investigating Officer took the accused to the office of the complainant and showed them all the Bills alongwith relevant G.C. Notes which were given by the three transporters to the Company and the present applicants had shown discrepancies in 84 bills. However, the Investigating Officer investigated into the discrepancies and did not find any substance in the allegation and the representative of the complainant confirmed that it was a case of excess billing on account of inclusion of certain costs by the transporters in their bills, contrary to the terms of the transportation contract.

10. The learned APP also invited my attention to the detailed affidavit in reply which was filed by the Investigating Officer. Initially, during the course of preliminary hearing when this Court was informed that there was a fabrication in respect of the sales of the company and that this was used for the purpose of evasion of sales tax and excise duty, this Court by

order dated 8/3/2006 directed the Government to file affidavit regarding the steps which were taken by the Investigating Officer and also had directed the Investigating Officer to explain why the other transporters were not arrested when the facts, according to the Government, disclosed evasion of sales tax and excise duty. A notice was therefore issued to the Advocate General, asking him to appear in this case. A direction was also given to the Investigating Officer to file an affidavit. The affidavit-in-reply was filed by Shri Rajendra Vishnu Ranmale which was affirmed on 16/3/2006. In the affidavit-in-reply, in para 13, a specific averment was made by the Investigating Officer that the goods mentioned in G.C. Notes had not even been manufactured by the complainant nor was transported by the applicants and, therefore, the question of evasion of excise duty or for that matter non-payment of sales tax by any party did not at all arise and that for whatever goods produced and manufactured by the company and actually transported by them, the concerned Central Excise and Sales Tax have been duly paid by the complainant company. In view of this statement, I am satisfied with the explanation tendered by the Investigating Officer and, therefore, the question of fabrication of seals as initially

alleged by the Government for the purpose of evasion of sales tax and excise duty does not arise in this case. I had given these directions because I felt that if the applicants and other transporters are involved with some other employees of the Company in the racket of evasion of excise duty and sales tax, the matter should be seriously investigated by the Government from that angle. However, the explanation given by the Investigating Officer in this behalf is accepted.

11. The second question is, whether a prima facie case has been made out by the applicants for the grant of anticipatory bail. In the present case, the gist of the complaint is that the applicants had given G.C. Notes which were fabricated in collusion with the employees of the Company and had cheated the Company in that process. The chronology of events discloses that the complaint pertains to the year 1997-98 and on two occasions investigation was made and on both the occasions the report was submitted by the Investigating Officer that the dispute, essentially, was of a civil nature. Civil Suits have been filed by the Company and by the applicants against each other which are pending in this Court for recovery of claims which are made by the complainant and the applicants

against each other. According to the Company, G.C. Notes were fabricated and though goods were actually never dispatched from the Company, fake bills were issued. On the contrary, it is the case of the applicants that the Company itself had deducted TDS to the tune of Rs 88 lakhs and that the Company was not paying their legal dues and, as a counterblast to the suit filed by the applicants, the present complaint has been filed in 1999. The report in respect of the investigation which is filed by the Senior Inspector of Police discloses that a thorough inquiry was made and it revealed that the dispute, essentially, was of a civil nature.

12. Even otherwise, all documents have been seized and the investigation is over. The custodial interrogation of the applicants, therefore, in my view, is not necessary. Another aspect which also is very important and which has a bearing on the facts of this case is that though the complaint was also filed against the other transporters, the said complaint was withdrawn and only after certain dues were demanded by the present applicants, this complaint was pursued by the complainant though the investigation was closed on two earlier occasions. One more aspect which has a bearing on the facts of the present case is that one

of the applicants Shri Ravi Kamal Kumar Goyal had lodged a Criminal Case No.40/I&R/99 against the complainant and others in the Court of Additional Chief Metropolitan Magistrate, 2nd Court, Mazgaon, Mumbai and this case was sent for investigation. The allegation which was made by Ravi Kamal Kumar Goyal i.e. one of the applicants was that the complainant - company had cheated them and withheld the payment of Rs 1,50,00,000/-. The complaint filed by Ravi Kamal Kumar Goyal and the complaint filed by the Company both were investigated and in both these cases the Investigating Officer came to the conclusion that both the cases are of civil nature. In the complaint filed by the Godrej Company vide MECR No.19/99 i.e. in the present case a written contract was executed between the complainant and the applicants to deliver the goods from one destination to another destination. Another contract was also executed between them dated 19/12/1996. The Investigating Officer in his report has stated that the last sentence in para 10 of the another written contract between them reads as under:-

> "in case GGEAL is denied modvat credit due to inadequacy of proper documents, the loss suffered by us over that account would be borne by you and debited to your account."

It is further observed in the said report that the Auditors of GGEAL on 6/4/1999 had alerted the Company that irregular, excessive bills were passed to the transporters and GGEAL on 10/4/1999 issued TDS Certificates to the applicants. It's sister concern also issued TDS certificate after 6/4/1999. Further, GGEAL sent a letter on 24/5/1999 to the applicants about its despatched refrigerators in the month of March and April 1999. The Investigating Officer has, therefore, observed that though the irregularities were noticed on the part of the applicants herein, the complainant continued and retained the contract with the applicants. There was thus an admission on the part of the complainant and there is every possibility that excessive bills were issued at the instance of the employees of the company and the contract was not terminated but was continued by the complainant. In this context, another fact which assumes significance is that when the anticipatory bail application was filed by the employees of GGEAL, it was not opposed by the Company and it was granted by the Sessions Court, since it was not opposed by the complainant, which fact is evident from the roznama of the order of the Sessions Court which is annexed at Exhibit-F to the application, the Sessions Court has observed as

under:-

"Applicant present, Advocate absent.

Mr. R.V. Kini, A.P.P. for the State.

SI Avadhoot Chavan of GB CB CID present.

. Perused the appln. and case papers. The applicant apprehends arrest in respect of MECR No. 19/99 registered by EOW CID u/s. 420, 406, 465 of IPC against the applicant on complaint by S. Radhakrishnan, Vice President of M/s. Godrej GE Appliances. This is arising out of complaint filed before the Ld. M.M. 34th Court, Vikhroli, Mumbai. The brief facts are narrated in the report submitted today. The report shows that the investigation is complete and the police is in the process of filing charge sheet against 5 accused including the applicant. This will show that a custodial interrogation of the applicant is not necessary. The applicant is, therefore, entitled to ant. bail. Hence the order."

This clearly indicates, therefore, that when anticipatory bail was granted to one of its employees

on 1/10/2003 at that time itself the investigation had been over and the Court felt that the custodial interrogation is not necessary. If the complainant was keen to know the facts regarding fabrication of G.C. Bills, it could have also opposed the application for anticipatory bail which was filed by one of its employees. This indicates that the Company was initially warned about the irregularities by its Auditors and yet, the contract with the applicants was not revoked. No efforts were made by the Company by allowing the interrogation to be done of its employees regarding the alleged fabricated G.C. Bills. This does not rule out the possibility of either Company itself having instructed the applicants to issue excessive bills for reasons best known to them or the present complaint is filed against the applicants as a counterblast to the demand and the complaint which was filed by one of the applicants i.e. Ravi Kamal Kumar Goyal.

13. Apart from that, according to the complainant, he had paid Rs 6 crores approximately to the applicants and the applicants have stated in writing that they have not received only Rs 6 crores approximately but have received Rs 7.50 crores approximately for the services rendered by them i.e. for transporting the

goods from one place to another. The money was paid by cross cheques in the bank account of the applicants. This fact is not disputed.

14. Another feature which is also important is that the Auditors Sharp & Tondon had given their report about the irregularities in the payment of bills to the complainant on 6/4/1999 and even then till 10/4/1999 TDS Certificates were being issued to the applicants by the complainant and its sister concern. The amount recovered towards TDS was payable to the Government. However, the complainant, in its statement has stated that the balance amount due to the transporters for the work done during November, 1998 to March 1999 was adjusted to the extent of Rs 60 lakhs against the fraudulent amount collected from the Company. Similarly, in the audited accounts of the company for the year ended March, 31, 1999 it is mentioned that, "Under Schedule S Note No.9b the company has during the year discovered certain irregularities including fraudulent invoicing by certain transporters during 1997-98 and 1998-99 and the company has recovered a part of the alleged defalcation." The Investigating Officer, therefore, in his report to the Magistrate has observed that the complainant itself had committed an irregularity by

adjusting the amount to his own credit, though it was payable. This also shows that the possibility of the Company itself having instructed the transporters to issue excessive bills for its tax purposes or for any other reason also cannot be ruled out.

15. Further, it is an admitted position that Ravi Goyal and Sashi Goyal, the applicants herein have filed suit no.4908/99 in the High Court, Bombay against the complainant (GGEAL) for recovery of this TDS amount by stating that this deduction of income-tax by the Company is an admission of liability by the defendants. The report further indicates that the allegation of forgery of sales also is incorrect and it has been observed that the Company has 20 persons in L & D and Audit & Accounts Departments and it is impossible that this irregularity would not have been noticed by the Company though the transactions have run over more than a period of 18 months and the Company's Bills were settled through cross account payee cheques. Lastly, it can be seen that the complainant had withdrawn the complaint against three of its other transporters and had continued to do business with them. However, it appears that since recovery could not be made from the present applicants, the present complaint is being pursued

against the present applicants and not against others. Therefore, the submissions made by the learned APP appearing on behalf of the State and the submissions made by the learned Counsel appearing on behalf of the complainant cannot be accepted.

16. In the result the following order is passed:-

O R D E R

. In the event of arrest of the applicants by GBCB CID of Economic Offence Wing, Mumbai in respect of the offence registered vide MECR No. 19/1999 for the offences punishable under sections 420, 406, 467, 468, 471 r/w 120-B of Indian Penal Code they be released on bail in the sum of Rs 25000/- each with one or two sureties in the like amount. Applicants, however, shall report to the Investigating Officer for a period of one week from 3rd April, 2006 between 11 a.m. to 5 p.m. Thereafter, twice in a month till fling of the charge-sheet and after the charge sheet is filed once in a month.

V.M. KANADE, J.